

MAY 9 1974

SUPREME COURT, U. S.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-370

NATIONAL LABOR RELATIONS BOARD,
v. *Petitioner,*

FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGA-
MATED MEAT CUTTERS AND BUTCHER WORKMEN OF
NORTH AMERICA, AFL-CIO,
HECK'S, INC.,

Respondents.

On Writ of Certiorari to the United States Court of
Appeals for the District of Columbia Circuit

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF
AND
SUPPLEMENTAL BRIEF OF THE EMPLOYER,
HECK'S, INC.**

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Heck's Inc., by its attorneys, hereby moves this Court pursuant to Rule 41(5) of the Court's Rules for leave to file the accompanying supplemental brief. In support whereof, the following is shown:

1. This case was argued before this Court on March 18 and 19, 1974. Subsequent to that hearing on April 25, 1974, the court below issued a decision in a closely related case—*Tiidee Products, Inc. v. National Labor Relations Board, et al.*, Nos. 72-1691, 2 (D.C. Cir. 1974)

—which bears significantly on the proper disposition of the instant case. As is more fully explained in the accompanying supplemental brief, the Circuit Court's decision in *Tiidee* directly affects the scope of the issues which the Court should consider and decide herein.

WHEREFORE, for the foregoing reasons, Heck's, Inc. respectfully moves the Court for leave to file the accompanying supplemental brief.

Respectfully submitted,

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**SUPPLEMENTAL BRIEF OF THE EMPLOYER,
HECK'S, INC.**

The instant brief is filed as a consequence of a decision issued by the court below subsequent to the oral argument herein which bears significantly on the proper disposition of this case.

In this proceeding both the petitioner National Labor Relations Board and the respondent Food Store Employees Union have assumed the existence of the Board's power to award litigation and organizational costs as a remedy against persons found to have violated the labor

laws. They differ among themselves as to the propriety of the Board's election in this case not to exercise that power as well as a reviewing court's right to compel such an exercise. Heck's, on the other hand, has argued the more basic, threshold proposition that, under the National Labor Relations Act, the Board possessed no such power to exercise in the first instance.

Both the Board and the Union urged this Court, in briefs and in oral argument, to disregard the question raised by Heck's. Those arguments were premised in part on the contentions that the court below had assumed the existence of the subject power, that neither the Board nor the Union had challenged its existence, and that, therefore, its existence, not having been adversely litigated, was not relevantly before this Court for examination.¹

However, on April 25, 1974, the court below rendered a decision in a closely related case which affects whether this Court should consider Heck's threshold arguments in the resolution of the instant case. *Tiidee Products, Inc. v. National Labor Relations Board, et al.*, Nos. 72-1691, 2 (CA DC, 1974) (*Tiidee III*). *Tiidee* raised specifically the question of the Board's statutory power or warrant to impose the extraordinary remedy of litigation and organization costs which Heck's has sought to raise herein. The court's opinion, however, rendered by a different panel from that which decided *Heck's*, held that it was compelled to find that the Board did possess such power *because that point had been decided in the Heck's case.*² Accordingly, the contention of the Board

¹ For example, the "Supplementary Brief for the National Labor Relations Board" in *Heck's* argued that "... it [*Heck's*] seeks to litigate an issue not presented in the petition or to the court of appeals."

² Thus, Judge MacKinnon, speaking for the court below noted, in his *Tiidee* opinion, that

[Footnote continued on page 5]

and the Union that this question is not before this Court in the instant *Heck's* case because it was not presented or addressed below cannot survive the contrary conclusion of the *Tiidee III* panel of the same lower court. Indeed, the view of the Board and the Union, if adopted, would result in a logical and procedural absurdity: neither this Court nor the court below can review the question of the Board's remedial power because the court below in its *Heck's* decision both did not decide—and did decide—, respectively, the merits of that issue.

The argument in favor of this Court's consideration here of the asserted existence of the challenged administrative remedial power derives support from the inextricable or symbiotic relationship between the *Heck's* and *Tiidee* cases. For it was in consequence of the lower court's remand in the first *Tiidee* case² that the Board determined it could impose litigation costs, a decision which the lower court then extended to *Heck's* which, in turn, was then applied as binding precedent in the recent *Tiidee* case decided on April 25, 1974. The lower court recognized the "disturbing circularity of this approach"³ which has also rendered *Heck's* and *Tiidee* indistinguishable aspects of a single decisional process and rule. And it is the legitimacy of that rule which *Heck's* seeks to raise here and which underlies both cases.

Therefore, in view of the intervention, following argument in the instant case, of *Tiidee III* and its binding

² [Continued]

"... Judges Tamm and Robb feel that debate in this circuit has been foreclosed by [*Heck's*] ... I agree ..."

"As stated above, we do not write today on a clean slate but are bound as to the law by *Food Store [Heck's]*."

³ *International Union of Electrical, Radio and Machine Workers v. NLRB*, 426 F.2d 1243, cert. den., 400 U.S. 950 (1970) (*Tiidee I*).

⁴ *Tiidee III*, at footnote 16.

reliance upon the *Heck's* decision below, *Heck's* seeks the adoption by this Court of one of the following appropriate methods for the disposition of this suit. The Court is urged either to decide the question of Board power raised by *Heck's* as one which was in fact raised and litigated below and constitutes a prerequisite for the resolution of this case; or to limit the decision in *Heck's* to the question of courts' authority to review the Board's remedial orders while reserving consideration of the scope of the Board's remedial power pending a joinder for argument on that issue of *Heck's* and *Tiidee*, now before the Court on petition for writ of certiorari.^{*} In the alternative, the Court may treat the instant submission as a Petition for Rehearing of *Heck's* prior petition for writ of certiorari, No. A-645, (73-559), occasioned by the lower court's recent decision in *Tiidee III* which conferred upon the *Heck's* decision below a role and importance not previously appreciated. The adoption of any of these enumerated alternatives would permit a resolution of a significant and recurring problem in the interpretation and administration of the National Labor Relations Act in a manner which would permit all affected parties in these cases to be heard without prejudice to any of them.

Respectfully submitted,

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